In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-740

JAMES S. GRAHAM,

Appellant,

vs.

MARCH FONG EU, Secretary of State, et al.,

Appellees.

On Appeal from the United States District Court for the Northern District of California

Motion to Affirm

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

STATUTES

CONSTITUTION

OTHER SOURCES

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Pursuant to Supreme Court Rule 16 (1) (c), Appellee March Fong Eu, Secretary of State of the State of California, hereby moves to affirm the decision in this appeal on the ground that the questions presented are so unsubstantial as not to warrant further argument.

OPINION BELOW

The opinion and Declaratory Judgment issued below and unanimously concurred in by the District Court, as to which this Motion to Affirm is filed, is contained in Appendix A and Appendix B, respectively, of the Jurisdictional Statement of appellant Graham.

INTRODUCTORY STATEMENT

The opininon of the District Court below ably sets forth those decisions of this Court which justify this Court concluding that further argument is unnecessary. Appellee files this motion to affirm, relying basically upon the strength of the opinion of the District Court. What arguments that are advanced in this motion must be read in conjunction with the opinion of the District Court.

PROCEEDINGS BELOW

The statement of the proceedings below as described by the appellant are substantially correct. Jurisdictional Statement, pages 3-4. However, as the opinion of the District Court indicates, the trial of the instant matter was consolidated with the trial of *Hollifield, et al. v. Fong Eu, et al.* (U.S.D.C. Central District of California No. S-2489-SC), in which a challenge was made to the winner-take-all aspects of the procedure for selecting delegates pursuant to California law for the Democratic National Convention. This latter action had been filed on June 23, 1972. Subsequent proceedings are reported in the opinion of the District Court. Jurisdictional Statement, Appendix A, page ii. California's Elections Code 6386, which provided for the 1972 presidential primary of the California Democratic Party that the winner with the highest number of votes received all the delegates allocated to the state by the party call, was repealed and replaced with the "Alquist Open Presidential Primary Act" which in its current state is set forth at California Elections Code sections 6300 *et seq.* and sections 10266 *et seq.* (California Statutes 1975, Chapter 1111.) The plaintiffs in this latter action filed a notice of appeal on October 9, 1975. However, they have not docketed

their appeal by filing a jurisdictional statement or otherwise complying with Rule 13 of the Supreme Court Rules within ninety days from the date of entry of judgment on September 9, 1975. Jurisdictional Statement, Appendix B, page xxxii. It appears they have abandoned their appeal but, in the event they attempt to pursue it, defendant Eu will oppose any tardy attempt to docket their appeal.

At the February 26, 1975 hearing on the merits, in addition to the certified copies of the presidential primary election returns in California from 1912 to 1972, the defendant Eu also introduced the Rules adopted by the Republican National Convention held at Miami Beach, Florida on August 21, 1972. Rule 31, relating to the election of delegates to the national convention, is attached to this Motion as an Appendix A and is set forth in its entirety.

CALIFORNIA'S PAST AND PRESENT STATUTORY SCHEME FOR THE SELECTION OF DELEGATES TO THE REPUBLICAN NATIONAL CONVENTION—RELEVANT STATUTES.

At the February 26, 1975 trial of this action, California provided for the selection of delegates to the Republican National Convention in the following manner. A committee would form for the purpose of circulating nomination papers for the candidacy of delegates who preferred a particular candidate for nomination of the party for the office of president or who preferred no candidate. California Elecetions Code section 6050. The group of delegate candidates selected by the committee had to obtain the endorsement of the candidate it preferred. California Elections Code section 6055. A candidate for delegate had to pledge support to the candidate he preferred for nomina-

tion "to the best of my judgment and ability." California Elections Code section 6057. The nomination papers, containing signatures equal to a specified percentage of the party's last gubernatorial vote, had to be filed seventy-four days before the presidential primary. California Elections Code section 6081. Provision was made for the publication and posting of a list of the names of each group of delegate candidates pledged to a particular candidate. California Elecetions Code section 6172. However, the ballot contained only the name of the persons preferred by the groups of delegate candidates or the chairman of an uncommitted group of delegate-candidates. California Elections Code section 10261. Once the defendant Secretary of State received the returns of the vote from the county clerks, the defendant Secretary of State was required to issue immediately certificates of elections to each delegate of the group of delegate candidates, committed or uncommitted, that received the highest number of votes. California Elections Code section 6201.

Effective January 1, 1976, this system for the selection for delegates has been changed. (California Statutes 1975, Chapter 1048) The defendant Secretary of State is charged with the duty of selecting on or before February 1st of the presidential primary year those persons who are generally recognized throughout the state or nation as candidates for the nomination of the Republican Party for placement on the ballot of the presidential primary election. California Elections Code section 6010. Persons who are unselected must qualify for the ballot by filing nomination papers containing a specified number of signatures. California Elections Code section 6021. A selected candidate may withdraw by filing an affidavit of non-candidacy not later than sixty-

four days before the presidential primary. California Elections Code section 6011. Each selected or qualified unselected candidate who wishes to have a delegation certified to the national convention by the defendant Secretary of State must file a list of delegates pledged to him thirty days before the presidential primary. California Elections Code section 6070. Each delegate must use his "best efforts" on behalf of his candidate until such candidate receives less than 10% of the vote at the convention, releases his delegates or two nominating ballots are taken at the convention. California Elections Code section 6071 (2) (c). The ballot must contain no reference to "groups of candidates" expressing a preference and the presidential primary column shall state only "PRESIDENTIAL PREFERENCE, Vote for One," so that only the names of candidates for nomination shall appear on the ballot. California Elections Code section 6080. The candidate who receives the highest number of votes is issued a certificate of election as the party's presidential nominee candidate from California. California Elections Code section 6056. Each of his selected delegates shall also receive a certificate of election. California Elections Code section 6057.

The new system then does not change the "winner-take-all" aspects of the former method. However, the identity of the delegates pledged to the candidates for nomination is given no pre-election publicity and the obligations of the delegates are reduced from "best of my judgment and ability" to release after specified conditions have been fulfilled, submerging further their visibility to the voter but enlarging the potential scope of their individual influence and discretion at the convention.

THERE IS NO INVIDIOUS DISCRIMINATION IN THE DIFFERENT EFFECT GIVEN TO SUCCESS AND DEFEAT AT THE CALIFORNIA REPUBLICAN PRESIDENTIAL PRIMARY WHERE THE VOTERS ARE OTHERWISE GRANTED EQUAL PARTICIPATION IN THE ELECTION AND PARTY ACTIVITIES.

The appellant's claim of invidious discrimination is not based upon a classification such as sex, wealth, race, religion, ethnic origin or geographic location which this Court has found to be the occasion of discrimination prohibited by the Equal Protection Clause of the Fourteenth Amendment. He claims that, although all voters participate equally at the election, those who support a candidate who does not obtain the highest number of votes and therefore "loses" also lose their chance to be directly represented at the national convention. However, this loss of representation is solely a function of voting for a particular candidate and is not a function of the voter's prior inability to fully participate in the primary election or in the political activities of his party. At least two decisions of this Court hold that loss of representation by defeat at the polls does not constitute a basis for a finding of invidious discrimination.

In *Williams v. Virginia State Board of Elections,* 288 F. Supp. 622 (I.D. Va. 1968), aff'd 393 U.S. 320 (1969) the plaintiffs challenged the winner-take-all aspects by which presidential electors were chosen. However, the District Court rejected this challenge and declared that, as long as participation in the vote was equally available and weighted, there was no invidious discrimination against those voters who voted for losing candidates. Id. at 627.

California's winner-take-all Republican presidential primary is neutral in the sense it is biased against no ascertainable group (at least until after the canvass of the votes) or against any particular candidate. In this respect, it is

no different from the district, majority rule system of voting where the winner of the vote wins the right to represent the entire district, including those who voted for the losing candidate. The district, majority rule system, in the context of multi-member districts, has been upheld by this Court in the face of objections based upon their "winner-take-all" aspects.

In *Whitcomb v. Chavis,* 403 U.S. 124 (1971) this Court reversed the judgment of a District Court which had ruled that Indiana's law, providing that fifteen representatives and eight senators to the state legislature were elected at large from Marion County, acted to invidiously dilute the vote of ghetto blacks where under a single district system they would be more effectively represented at the state legislature by candidates who had to appeal and to be accountable to them directly. This Court pointed out in *Whitcomb* that in *Fortson v. Dorsey,* 379 U.S. 433, 439 (1965) it had refrained from holding that multi-member districts were per se unconstitutional but had left open the question where a showing might be made that there was a dilution of the vote of ". . . racial or political elements of the voting population." *Whitcomb* at 143. However, in *Whitcomb* the plaintiffs failed to sustain their burden of proof that the alleged lack of legislators reflecting "ghetto" interests was anything more than product of lost elections. This Court stated that the "winner-take-all" aspects of such districts did not mean they were automatically unconstitutional.

> "We are not insensitive to the objections long voiced to multi-member district plans. Although not as prevalent as they were in our early history, they have been with us since colonial times and were much in evidence both before and after the adoption of the Fourteenth Amendment. Criticism is rooted in their winner-take-all aspects, their tendency to submerge

minorities and to overrepresent the winning party as compared with the party's statewide electoral position, a general preference for legislatures reflecting community interests as closely as possible and disenchantment with political parties and elections as devices to settle policy differences between contending interests. The chance of winning or significantly influencing intraparty fights and issue-oriented elections has seemed to some inadequate protection to minorities, political, racial, or economic; rather, their voice, it is said, should also be heard in the legislative forum where public policy is finally fashioned. In our view, however, experience and insight have not yet demonstrated that multi-member districts are inherently invidious and violative of the Fourteenth Amendment." (Footnotes omitted.) Id. at 137-140.

This Court later in *White v. Register,* 412 U.S. 755 (1972) upheld the disestablishment of multi-member districts where the district court had found that, in fact, black and Mexican-American voters ". . . had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." Id. at 766. In *Connor v. Johnson,* 402 U.S. 690 (1971) and in *Chapman v. Meier,* 420 U.S. 1 (1974) this Court has announced its preference for single member districts where a districting plan has been ordered by the district court and multi-member districts, as a political choice, did not emerge from the state legislature or were not evident in the state's immediate past. However, there is no judicial imposed primary in this proceeding and there was no evidence before the District Court that any voter has less opportunity than other voters to participate in the primary or in the conduct of party affairs. Accordingly, these decisions are relevant to the appellant's ap-

peal insofar as they affirm the holding of *Whitcomb* that, absent discrimination which prevents participation in the election and political process, a lack of representation based upon the loss of an election is not unconstitutional.

GRATUITOUS LANGUAGE OF THIS COURT IN GRAY V. SANDERS, 372 U.S. 368 (1963) HAS BEEN MISCONSTRUED BY THE APPELLANT AS RELEVANT TO THIS APPEAL.

The appellant relies heavily upon *Gray v. Sanders,* 372 U.S. 368 (1963), not so much upon the facts of that decision but upon language which appears in a footnote. Jurisdictional Statement, pages 14-15. In *Gray,* this Court held a Georgia direct primary system where the heavily populated counties were given a unit vote equal to that of the less populated rural counties as a violation of the "one-man, one-vote" principle. In a footnote, the comment was made that, even if the counties were equal in population, the system would still be unconstitutional since the votes cast for a losing candidate in a county would be a vote cast for ". . . the purpose of being discarded." Id. at 381 (footnote 12). This comment would be correct only if the candidate with the highest popular vote lost the primary because minor candidates bled off votes in some district sufficiently to cause him to lose by narrow margins in those districts. In any event, this Court specifically disavowed any impact of that footnote outside of the facts before the Court:

> "We do not reach here the questions that would be presented were the convention system used for nominating candidates in lieu of the primary system." Id. at 378 (footnote 10).

This footnote in *Gray* has not been given any application by this Court beyond the confines of the decision itself. This Court declared in *Fortson v. Morris,* 385 U.S.

231, 235 (1966) that *Gray* ". . . did no more than to require the State to eliminate the county-unit machinery from its election system. . . ." More recently, note must be taken of Justice Rehnquist's concurring opinion in *Cousins v. Wigoda,* 419 U.S. 477, 494 (footnote 1) (1975), referring to footnote 10 in *Gray,* that such "gratuitous observations" are not favored where the issue was not presented to the Court for resolution.

THE MANNER IN WHICH THE NATIONAL PARTY PERMITS THE STATES TO SELECT THEIR DELEGATES IS MANIFESTLY WITHIN THE FIRST AMENDMENT ASSOCIATIONAL RIGHTS OF THE NATIONAL PARTY.

The Rules which shall govern the proceedings of the 1976 Republican Convention provide that delegates shall be elected in conformity with state law. Specifically, Rule 31 which is set forth in its entirety as Appendix A, provides:

> "Delegates at Large to the National Convention and their alternatives and Delegates from Congressional Districts to the National Convention and their Alternate shall be elected in the following manner: (a) *By primary election in accordance with the applicable laws of such States as required by law,* the election of Delegates to the National Conventions of political parties by direct primary and in the District of Columbia in accordance with its law. . . ." [Emphasis supplied.]

There is no statement in the Rules which adopts in general or which imposes the winner-take-all system upon the California Republican Party. It is clear, nevertheless, that the present party Rules permit its use and that delegates selected in California under that system will be seated pursuant to Rule 31 (a) quoted above. Rule 31, regarding the election of delegates, is set out in its entirety in Appendix

A because it illustrates the diversity of selection procedures of the state parties which respond to the national party's call. It is clear from Rule 31 that the national party has made a fundamental determination to permit the state parties determine the method by which they will send delegates to the national convention. It is submitted that this determination by the national party is within its associational rights protected by the First Amendment and is thereby not subject to intrusion by this Court.

This Court has ruled that the seating of delegates to the national party convention come within the protection of the First Amendment as part of associational rights. In *Cousins v. Wigoda,* 419 U.S. 477 (1975), the Democratic voters of Chicago had elected "Wigoda" delegates at the presidential primary to the 1972 Democratic National Convention in conformity with Illinois election law. The "Cousins" delegates, included some delegates who had been defeated at the Illinois primary, challenged the seating of the *Wigoda* delegates on the ground that the delegates had not been selected by procedures and slate-making rules previously adopted by the party. The convention refused to seat the *Wigoda* delegation and seated the *Cousins* delegation. An Illinois Court enjoined the *Cousins* delegates from participating in the convention or accepting seats. This Court, on appeal from the Illinois Court's judgment of contempt against the *Cousins* delegates after they ignored the injunction, held that the determination of the convention regarding delegate creditation had "primacy" over state law. Id. at 483. Preliminarily, this Court held the national convention is an association protected by the First Amendment:

> "The National Democratic Party and its adherents enjoy a constitutionally protected right of political association. There can no longer be any doubt that

> freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments . . . The right to associate with the poltical party of one's choice is an integral part of this basic constitutional freedom. *Kusper v. Pontikes,* 414 U.S. 51, 56-57 (1973). . . ." Id. at 487.

Moreover, this Court held that the qualifications and eligibility of delegates was a matter for the decision of the convention. Id. at 490. This Court went as far as to state that:

> "The Convention was under no obligation to seat the respondents but was free, as respondents concede,[8] to leave the Chicago seats vacant and thus defeat the objective." Id. at 488 [Footnote not quoted.]

There was no claim in *Cousins* that the procedures employed for delegate selection were unconstitutional. Holding that in mind, this Court quoted an earlier decision involving convention delegates to the effect that "'. . . the convention itself (was) the proper forum for determining intra-party disputes as to which delegates (should) be seated.'" Id. at 491 (quoting from *O'Brien v. Brown, infra,* 409 U.S. 1, 4 (1972)). Here, the plaintiff has made a claim that the delegate selection process is unconstitutional. However, the constitutional infirmity he asserts, based solely on the success or loss of a yet to be ascertained candidate, is not one recognized by this Court, and was rejected under the reasoning in *Whitcomb* and *Williams*. Nevertheless, granting that unlike the petitioners in *Cousins* the appellant has challenged the procedures under which delegates are selected, appellee urges upon this Court that the decision to accept or reject California's delegation must be left to the convention and its appropriate contest and credentials committees

as manifestly within the First Amendment associational rights of the National Republican Party.

This Court in *O'Brien v. Brown, supra* 409 U.S. 1 (1972) issued a stay of extraordinary relief ordered by the Court of Appeals for the District of Columbia where the Court of Appeals had ordered the 1972 Democratic Party Convention to admit as delegates persons who had been elected pursuant to California's winner-take-all primary but who had been unseated by the Credentials Committee of the convention. This Court issued its stay, recognizing that it was presented with ". . . relationships of great delicacy that are essentially political in nature." Id. at 4. Furthermore, this Court stated:

> "It has been understood since our national political parties first came into being as voluntary associations of individuals that the convention itself is the proper forum for determining intra-party disputes as to which delegates shall be seated. Thus, these cases involve claims of the power of the federal judiciary to review actions heretofore thought to lie in the control of political parties. Highly important questions are presented concerning justiciability, whether the action of the Credentials Committee is state action and, if so, the reach of the Due Process Clause in this unique context. Vital rights of association guaranteed by the Constitution are also involved. While the Court is unwilling to undertake final resolution of the important constitutional questions presented without full briefing and argument and adequate opportunity for deliveration, *we entertain grave doubts as to the action taken by the Court of Appeals.*" Id. at 4-5. [Emphasis supplied.]

Appellee Eu submits that when a political party establishes procedures for the selection of delegates and nominees for elective office that are neutral as to identifiable groups

or particular candidates the nature of those procedures are within the rights of association protected by the First Amendment. The appellant bemoans the loss of representation of the California party member, who voted for a losing candidate, at the convention. The appellant, however, assumes whether the convention is purely deliberative (no lawfully binding committments), purely registering (each delegate pledged to a candidate) or a combination of these is not a question for the party itself to determine. The appellant overlooks or ignores that the national political convention is not an on-going deliberative assembly for the enactment of legislation. Its function is to serve as a vehicle by which the party selects candidates for President and Vice-President who must be successful at the general election if the party is to survive. The delegates have no tenure of office such that they can be later held accountable for their choices before the voters. There is a limited time for the large number of these delegates who do not contemplate a continuous relationship and who do not necessarily have any experience in assembly deliberations to render their decision. Accordingly, the decision of the Party to leave the question of the selection of delegates to states, serves the purpose of permitting each state party to determine how to overcome these inherent difficulties at the national convention and yet best reflect the sentiments of the members of the party within the state. This *modus vivendi* among the state parties unquestionably involves ". . . relationships of great delicacy that are essentially political in nature." *O'Brien v. Brown*, 409 U.S. 1, 4 (1972). For this Court to intrude upon this decision by the national party would be to substitute its judgment for that party regarding the best balance to be struck between representa-

tion of party members at the convention and the necessity of the party to produce successful nominees. This Court has traditionally shunned that role and should so refuse in this appeal.

CONCLUSION

For the reasons given above, the issue presented by this appeal is so unsubstantial that further argument is not warranted. This motion for affirmance should be granted.

Respectfully submitted,

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Appendix A

ELECTION OF DELEGATES TO NATIONAL CONVENTION

RULE NO. 31

Delegates at Large to the National Convention and their Alternates and Delegates from Congressional Districts to the National Convention and their Alternates shall be elected in the following manner:

(a) By primary election in accordance with the applicable laws of such States as required by law, the election of Delegates to the National Conventions of political parties by direct primary and in the District of Columbia in accordance with its law; provided, that in any of these in which Republican representation upon the Board of Judges or Inspectors of Elections for such primary election is denied by law, Delegates and Alternates shall be elected as hereinafter provided.

(b) By Congressional District or State Conventions, as the case may be, to be called by the Congressional District or State Committees, respectively. Notice of the Call for any such Convention shall be published in a newspaper or newspapers of general circulation in the Congressional District or State, as the case may be, not less than fifteen (15) days prior to the date of said Convention.

(c) In selecting Delegates and Alternates to the National Convention, no State law shall be observed which hinders, abridges or denies to any citizen of the United States, eligible under the Constitution of the United States, to the office of President or Vice President, the right or privilege of being a candidate under such State law for the nomination for the President or Vice President; or which authorizes the election of a number of Delegates or Alternates from any State to the National Convention different from that fixed in these Rules.

(d) By the Republican State Committee or Governing Committee in any State in which the law of such State specifically authorizes the election of Delegates or Alternates in such manner.

(e) In a Congressional District where there is no Republican Congressional Committee, the Republican State Committee shall issue the Call and make said publication.

(f) All Delegates from any State may be chosen from the State at Large, in the event that the laws of the State in which the election occurs, so provide.

(g) Alternate Delegates shall be elected to said National Convention for each unit of representation equal in number to the number of Delegates elected therein and shall be chosen in the same manner, at the same time, and under the same rules the Delegates are chosen; provided, however, that if the law of any State shall prescribe the method of choosing Alternates they shall be chosen in accordance with the provisions of the law of the State in which the election occurs.

(h) The election of Delegates and Alternates from the District of Columbia, Guam, Puerto Rico, and the Virgin Islands shall be held under the direction of the respective recognized Republican Governing Committee therein in conformity with the Rules of the Republican National Committee or the laws of the District of Columbia, Guam, Puerto Rico, and the Virgin Islands.

(i) Election of Delegates and Alternates shall be certified in every case where they are elected by Conventions, by the Chairman and Secretary of such Conventions, respectively, and forwarded to the Secretary of the Republican National Committee, and in the case of election by Primary, they shall be certified by the proper official and all certificates shall be forwarded by said duly elected Delegates and Alternates in the manner herein provided.

(j) All Delegates and Alternates shall be elected not later than thirty-five (35) days before the date of the meeting of said National Convention, unless otherwise provided by the laws of the State in which the election occurs.

(k) Delegates and Alternates at Large to the National Convention when serving as Delegates and Alternates shall be duly qualified voters of their respective States. All Delegates and Alternates allocated as Delegates and Alternates at Large shall be elected at Large in the several States unless otherwise provided by State law.

(l) Delegates and Alternates to the National Convention, representing Congressional Districts, shall be residents and qualified voters in said districts respectively when serving as Delegates and Alternates. All Delegates and Alternates allocated to represent Congressional Districts shall be elected by the Congressional District of the several States unless the laws of the State shall otherwise provide.

(m) No Delegate or Alternate Delegate shall be required to pay an assessment or fee in excess of that provided by the law of the State in which the election occurs as a condition of serving as a Delegate or Alternate Delegate to the Republican National Convention.

ELECTION OF DELEGATES TO DISTRICT AND STATE CONVENTIONS

Delegates to Congressional District and State Conventions shall be elected under the following rules:

(n) Only legal and qualified voters shall participate in a Republican primary, caucus, mass meeting, or mass convention held for the purpose of selecting Delegates to a County, District, or State Convention, and only such legal and qualified voters shall be elected as Delegates to County, District and State Conventions: provided, however, that in

addition to the qualifications provided herein the governing Republican Committee of each State, shall have the authority to prescribe additional qualifications not inconsistent with law. Such additional qualifications shall be adopted and published in at least one daily newspaper having a general circulation throughout the State, such publication to be at least ninety (90) days before such qualifications shall become effective.

(o) No Delegates shall be deemed eligible to participate in any convention to elect Delegates to the said National Convention, who were elected prior to the date of issuance of the Call of such National Convention.

(p) District Conventions shall be composed of Delegates who are legal and qualified voters therein, and Delegates to State Conventions shall be qualified voters of the respective districts which they represent in said State Conventions. Such Delegates shall be apportioned among the counties, parishes, and cities of the State or District having regard to the Republican vote therein.

(q) There shall be no proxies at a convention held for the purpose of selecting Delegates to the Republican National Convention. If Alternate Delegates to such selection Convention are selected, the Alternate Delegate, and no other shall vote in the absence of the Delegate.

(r) There shall be no automatic Delegates at any level of the Delegate selection procedures who serve by virtue of Party position or elective office.

(s) The Republican National Committee shall assist the States in their efforts to inform all citizens how they may participate in Delegate selection procedures. The Republican National Committee in cooperation with the States shall prepare instructive material on Delegate selection methods and make it available for distribution.